A **DATO' SRI MOHD NAJIB TUN HJ ABDUL RAZAK & ANOR v. MOHD RAFIZI RAMLI & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
IDRUS HARUN JCA
B MARY LIM JCA
[CIVIL APPEALS NO: W-02(IM)(NCVC)-1094-06-2016 &
W-02(IM)(NCVC)-1095-06-2016]
3 NOVEMBER 2017

C ***CIVIL PROCEDURE:*** *Striking out – Application for – Defamation action – Defence of fair comment – Obligation to give particulars – Whether particularised facts relied upon to support allegations made – Whether allegations based on true beliefs or opinions – Whether statements mere allegation of facts – Whether defence of fair comment available – Rules of Court 2012, O. 78 r. 3(2)*

D ***TORT:*** *Defamation – Defence – Fair comment – Whether applicable only when statements made are comments based on certain facts – Test – Whether ordinary reasonable reader on reading whole article would understand words as comment or statement of fact – Whether court could decide based on pleadings alone – Whether pleaded defence set out facts relied upon which formed basis of purported comment* E *– Whether statements mere allegation of facts – Whether defence of fair comment available*

The first and second appellants ('the plaintiffs') filed a suit against the respondent ('the first defendant') and the second defendant in the High Court for the alleged defamatory remarks that were made during a forum, wherein F the first defendant delivered a speech on issues relating to 'oil subsidies and the subsequent effects'. The speech had been uploaded by the second defendant himself or by his servants or agents onto the Media Rakyat's Youtube channel and Media Rakyat's web page. This was later shared by the second defendant or his servants or agents on Media Rakyat's Facebook page G ('the recording'). The recording contained, *inter alia*, words which were alleged to be defamatory of the plaintiffs. The defendants filed two separate defences in which they raised the defence of fair comment and qualified privilege. The defendants also counterclaimed for damages in tort on abuse of process and victimisation. The plaintiffs filed two separate applications to H strike out part of the defence and counterclaim of the defendants, *ie*, (i) encl. 16 to strike out the pleaded defence of fair comment in paras. 24, 25, 26 and 26A of the first defendant's amended defence and counterclaim; and (ii) encl. 21 to strike out the defence of fair comment pleaded in paras. 25, 26 and 27 of the second defendant's defence and counterclaim. The I main thrust of the striking out application in both enclosures was premised on the legal issue that a defence of fair comment must be grounded on

comments and not statement of facts. The High Court dismissed the plaintiffs' applications on the grounds that the impugned paragraphs were not clearly unsustainable and were not plainly obvious to merit striking out. The High Court opined that it would not be able to make its finding as to whether the impugned statements were not comments purely by looking at the pleadings and that in order to so determine, evidence must be adduced and heard before the court. Hence, these appeals by the plaintiffs.

Held (allowing appeals with costs in cause)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) It is settled law that the defence of fair comment is applicable only when the statements made are comments based on certain facts. A statement purportedly based on 'facts' alone, or even if it is a case where there is a mixed of facts and comments, until a reader cannot distinguish which are the facts, and which are comments, cannot be shielded under a defence of fair comment. The applicable test is 'whether an ordinary reasonable reader on reading the whole article would understand the words as a comment or a statement of fact' (*Lee Kwan Yew v. Derek Gwyn Davies & Ors*). Hence, in determining whether or not a particular statement is a comment or otherwise, the court will have to examine the statement, applying the test of a reasonable person. It is to be determined on whether or not that statement is an opinion or a comment which is based on certain facts. (paras 10, 13 & 15)

(2) There are four elements which constitute a defence of fair comment, *ie*, (i) the words complained of are comments, although they may consist or include inferences of facts; (ii) the comment is a matter of public interest; (iii) the comment is based on facts; and (iv) the comment is one which a fair minded person can honestly make on the facts proved (*Joshua Benjamin Jeyaratnam v. Goh Chok Tong*). The court is thus fully-entitled to decide that a particular statement is a comment and not a bare or naked statement of facts when it contains a person's belief for his conclusion which is based on, or drawn from, certain facts. Hence, the court has to firstly determine whether a statement is a comment or not, before determining whether the defence of fair comment is available. (paras 17 & 18)

(3) It is not always necessary for the court to decide whether a particular statement is a comment or otherwise by adducing evidence from witnesses. From the pleadings and the pleaded impugned statements, it was plain and clear that the statements made by the first defendant were not an opinion or what the first defendant believed, or his comment on any particular fact. Further, when a comment is based upon facts, it could not be on the facts invented by the maker himself. It must rest

upon facts which are presumed to be true. If the facts never existed, then the defence must fail. However, the defendants' pleaded defence did not set out the facts relied upon and which formed the basis of the purported comment. (paras 19, 21 & 22)

(4) The impugned statement clearly showed that it was not a comment but a mere allegation or statement of facts. Upon consideration of the speech as a whole and the first defendant's defence in paras. 24, 25, 26 and 26A, none of the facts pleaded supported the allegation that the plaintiffs had stolen and pocketed people's monies from the removal of the oil subsidies for their personal gains to enable a characterisation that the statement was a comment or an opinion premised upon some facts. Without the underlying facts which could form the basis of a comment, the impugned statement could not be said to be a comment that could qualify for a defence of fair comment. The defendants failed to adhere to the requirements of O. 78 r. 3(2) of the Rules of Court 2012. The court thus allowed the appeals and the plaintiffs' application in encl. 16 which was binding on the application in encl. 21. (paras 23, 25 & 26)

Bahasa Malaysia *Headnotes*

Perayu pertama dan kedua ('plaintif-plaintif') memfailkan guaman terhadap responden ('defendan pertama') dan defendan kedua di Mahkamah Tinggi bagi kenyataan memfitnah yang dibuat dalam satu forum, di mana defendan pertama menyampaikan ucapan atas isu-isu berkaitan dengan 'subsidi minyak dan kesannya'. Ucapan tersebut dimuat naik oleh defendan kedua sendiri atau oleh pekerjanya atau ejennya dalam saluran Youtube Media Rakyat dan laman sesawang Media Rakyat. Ini kemudian dikongsi oleh defendan kedua atau pekerjanya atau ejennya dalam laman Facebook Media Rakyat ('rakaman'). Rakaman tersebut mengandungi, antara lain, perkataan-perkataan yang didakwa memfitnah plaintif-plaintif. Defendan-defendan memfailkan dua pembelaan yang berbeza dan mereka membangkitkan pembelaan ulasan saksama dan perlindungan bersyarat. Defendan-defendan juga menuntut balas bagi ganti rugi dalam tort bagi penyalahgunaan proses dan pemangsaan. Plaintif-plaintif memfailkan dua permohonan berasingan untuk membatalkan sebahagian pembelaan dan tuntutan balas defendan-defendan iaitu (i) lampiran 16 untuk membatalkan pembelaan ulasan saksama yang diplidkan dalam per. 24, 25, 26 dan 26A dalam pembelaan dan tuntutan balas pindaan defendan pertama; dan (ii) lampiran 21 untuk membatalkan pembelaan ulasan saksama yang diplidkan dalam per. 25, 26 dan 27 pembelaan dan tuntutan balas defendan kedua. Asas utama permohonan dalam kedua-dua lampiran adalah isu undang-undang bahawa pembelaan ulasan saksama mesti berdasarkan komen dan bukan kenyataan fakta. Mahkamah Tinggi menolak permohonan plaintif-plaintif atas alasan perenggan yang dipersoalkan bukan jelas tidak boleh dikekalkan dan

mewajarkan pembatalan. Mahkamah Tinggi berpendapat bahawa dapatan sama ada kenyataan-kenyataan yang dipersoalkan bukan jelas komen tidak boleh dibuat hanya dengan melihat pliding dan untuk memutuskannya, keterangan perlu dikemukakan dan didengar di mahkamah. Oleh itu, rayuan-rayuan ini oleh plaintif-plaintif.

Diputuskan (membenarkan rayuan-rayuan dengan kos dalam kausa)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Undang-undang adalah matan bahawa ulasan saksama terpakai hanya apabila kenyataan-kenyataan yang dibuat adalah komen berdasarkan fakta tertentu. Satu kenyataan yang kononnya berdasarkan 'fakta' semata-mata, atau jika dalam keadaan yang merupakan fakta bercampur dengan komen, sehingga pembaca tidak boleh membezakan antara fakta dan komen, tidak boleh dilindungi bawah pembelaan ulasan saksama. Ujian yang diguna pakai adalah 'sama ada pembaca biasa yang membaca keseluruhan artikel tersebut akan memahami perkataan-perkataan tersebut sebagai komen atau kenyataan fakta' (*Lee Kwan Yew v. Derek Gwyn Davies & Ors*). Oleh itu, dalam menentukan sama ada atau tidak sesuatu kenyataan adalah komen atau sebaliknya, mahkamah perlu memeriksa kenyataan tersebut, mengguna pakai ujian seorang yang munasabah. Perlu ditentukan sama ada kenyataan tersebut adalah pendapat atau komen yang berdasarkan fakta tertentu.

(2) Terdapat empat unsur yang membentuk pembelaan ulasan saksama, iaitu (i) perkataan yang diadukan adalah komen, walaupun ini mungkin mengandungi atau termasuk inferens fakta; (ii) komen tersebut perkara berkepentingan umum; (iii) komen tersebut berasaskan fakta; dan (iv) komen tersebut adalah sesuatu yang seseorang yang munasabah boleh buktikan secara jujur berdasarkan fakta (oleh Lord Ackner dalam *Joshua Benjamin Jeyaratnam v. Goh Chok Tong*). Oleh itu mahkamah berhak menentukan bahawa kenyataan tertentu itu adalah komen dan bukan kenyataan fakta semata-mata hanya kerana mengandungi apa yang dipercayai oleh orang itu dalam mencapai keputusannya berasaskan padanya, atau dibuat daripada fakta tertentu. Dengan itu, mahkamah perlu menentukan dahulu sama ada kenyataan itu adalah komen atau bukan sebelum memutuskan sama ada pembelaan ulasan saksama wajar terpakai.

(3) Tidak selalu mahkamah perlu menentukan sama ada sesuatu kenyataan tertentu itu adalah komen atau sebaliknya dengan mengemukakan keterangan saksi. Berdasarkan pliding dan kenyataan yang dipersoalkan yang diplidkan, jelas bahawa kenyataan yang dibuat oleh defendan pertama bukan pendapat atau apa yang dipercayai defendan pertama, atau komennya atas sesuatu fakta tertentu. Selanjutnya, apabila komen berdasarkan fakta, ini tidak boleh direka atas fakta oleh pembuatnya

A sendiri. Ini perlu diasaskan atas fakta yang dianggap benar. Jika fakta itu tidak pernah wujud maka pembelaan akan gagal. Walau bagaimanapun, pembelaan defendan-defendan yang diplidkan tidak menyatakan fakta-fakta yang disandarkan dan yang membentuk asas komen yang didakwa dibuat.

B **(4)** Kenyataan yang dipersoalkan jelas menunjukkan bahawa kenyataan tersebut bukan komen tetapi hanya dakwaan atau kenyataan fakta. Setelah mempertimbangkan ucapan secara keseluruhan dan pembelaan defendan pertama dalam perenggan 24, 25, 26 dan 26A, tiada satu pun fakta yang diplidkan yang menyokong dakwaan bahawa plaintif-plaintif
C telah mencuri dan memasukkan wang rakyat ke dalam poket mereka dengan menghapuskan subsidi minyak bagi faedah mereka sendiri untuk membolehkan kenyataan tersebut digambarkan sebagai komen atau pendapat yang diasaskan atas fakta tertentu. Tanpa fakta-fakta yang berasas yang boleh membentuk asas komen tersebut, kenyataan yang
D dipersoalkan tidak boleh dikatakan komen yang melayakkannya pembelaan komen wajar. Defendan-defendan, oleh itu, gagal mematuhi keperluan A. 78 k. 3(2) Kaedah-Kaedah Mahkamah 2012. Oleh itu, mahkamah membenarkan rayuan-rayuan dan permohonan plaintif-plaintif dalam lampiran 16 yang mengikat permohonan dalam lampiran
E 21.

Case(s) referred to:

Broadway Approvals v. Odhams Press [1965] 2 All ER 523 ***(refd)***

Chong Swee Huat & Anor v. Lim Shian Ghee t/a L & G Consultants & Education Services [2009] 4 CLJ 113 CA ***(refd)***

F *Datuk Seri Mohammad Nizar Jamaluddin lwn. Utusan Melayu (M) Bhd [2014[2 CLJ 605 HC* ***(refd)***

Henry Wong Jan Fook v. John Lee & Anor [1975] 1 LNS 57 FC ***(refd)***

Hunt v. Star Newspaper Co Ltd [1908] 2 KB 309 ***(refd)***

Joshua Benjamin Jeyaretnam v. Goh Chok Tong [1989] 1 LNS 34 PC ***(foll)***

Kemsly v. Foot [1952] 1 All ER 501 ***(refd)***

G *Lee Kuan Yew v. Derek Gwyn Davies & Ors [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 HC* ***(refd)***

Meeran Lebbaik Maullim v. J Mohamed Ismail Marican & The Straits Printing Works (1926) 2 MC 85 ***(refd)***

S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor [2011] 1 CLJ 460 CA ***(refd)***

H **Legislation referred to:**

Rules of Court 2012, O. 18 r. 19, O. 78 r. 3(2)

(Civil Appeal No: W-02(IM)(NCVC)-1094-06-2016)

For the appellants - Mohd Hafarizam Harun & Nik Nuraisha Alia Hanafi; M/s Hafarizam Wan & Aisha Mubarak

I *For the respondent - Ranjit Singh; M/s Sun & Michele*

(Civil Appeal No: W-02(IM)(NCVC)-1095-06-2016)
For the appellants - Mohd Hafarizam Harun & Nik Nuraisha Alia Hanafi; M/s Hafarizam Wan & Aisha Mubarak
For the respondents - Ng Wai Yen; M/s Yeoh & Joanne

[Editor's note: For the High Court judgment, please see Dato' Sri Mohd Najib Tun Haji Abdul Razak & Anor v. Mohd Rafizi Ramli & Anor [2016] 1 LNS 587 (overruled).]

Reported by S Barathi

JUDGMENT

Rohana Yusuf JCA:

[1] The first plaintiff is the Prime Minister of Malaysia and the second plaintiff is the wife of the first plaintiff. They filed this suit against the defendants for defamation.

[2] The alleged defamatory remarks were made during a forum in Bandar Tun Razak, Kuala Lumpur on 3 November 2014. At that forum, the first defendant delivered a speech on issues relating to "oil subsidies and the subsequent effects". That speech was said to have been uploaded by the second defendant himself or by his servants or agents onto Media Rakyat's Youtube channel at https://www.youtube.com/ watch?v=pgVM9qbnmUA and Media Rakyat's web page at www.mediarakyat.net which entitled "Rafizi Ramli: Kenapa Kita pertahankan subsidi Minyak". This was later shared by the second defendant or his servants or agents on Media Rakyat's Facebook page at https://www.facebook.com/mediarakyatnet?fref=ts (to be collectively referred to as the recording).

[3] The recording contains, *inter alia,* the following words which are alleged to be defamatory of the plaintiffs:

> ... saya tanya berkali-kali bila nak turun harga minyak takkan bila harga pasaran naik, cepat-cepat kamu naikkan bila turun, duit untung itu kamu simpan dalam poket bagi Rosmah belanja. Mana aci!
>
> ... tiap-tiap bulan kerajaan UMNO Barisan Nasional jimat satu ribu juta, satu ribu juta tahu tak banyak mana satu ribu juta boleh beli dua puluh cincin mahal Rosmah. Satu cincin dia dua puluh juta lebih. Satu ribu juta saya kata pulangkan balik kepada rakyat. Sebab itu duit rakyat, bukan duit bapak kamu punya.
>
> ... masalahnya kalau duit minyak tu sampai dalam poket dia dulu, kalau sampai seratus pakcik, yang sampai kepada rakyat lima ringgit. Sembilan puluh lima ringgit masuk kocek dia dengan masuk beg tangan Rosmah. Sebab itu kita kata dalam Negara Malaysia untuk kita pastikan harta kekayaan minyak itu sampai terus kepada rakyat mesti ada subsidi minyak kerana hanya dengan subsidi minyak dia tak masuk poket Najib dulu dia pergi kepada rakyat ...

[4] The defendants filed two separate defences and in both of which, they raised the defence of fair comment and qualified privilege. The defendants also counterclaimed for damages in tort on abuse of process and victimisation.

[5] At the High Court, the plaintiffs filed two separate applications to strike out part of the defence and counterclaim of the defendants. Enclosure 16 is an application by both plaintiffs to strike out the pleaded defence of fair comment in paras. 24, 25, 26 and 26A of the first defendant's amended defence and counterclaim. Enclosure 21 is an application to strike out the defence of fair comment pleaded in paras. 25, 26 and 27 of the second defendant's defence and counterclaim. The main ground of the plaintiffs' applications is premised on the legal issue that the statements made by the defendants in the recording are not comments but pure allegations of facts, which do not qualify to sustain a defence of fair comment. Therefore, learned plaintiffs' counsel submitted, the pleaded defence of fair comment by the defendants are obviously unsustainable and liable to be struck out.

[6] Since the issues involved in both applications are essentially encl. 16 to be heard by the learned judge first, the outcome of which, would bind the other application in encl. 21.

[7] On 15 April 2016, the High Court dismissed encl. 16 which consequently led to the dismissal of encl. 21. In dismissing the application, the learned trial judge found that the impugned paragraphs were not clearly unsustainable and were not plainly obvious to merit striking out. Her Ladyship opined that the court would not be able to make its finding as to whether the impugned statements were not comments purely by looking at the pleadings. According to the learned judge, in order to determine so, the court would have to have evidence adduced and heard before the court.

[8] On this decision, the plaintiffs are appealing before us. We have heard the appeals and had unanimously allowed the same. We now set out our reasons for our decision.

[9] As we have alluded to earlier, the main thrust of the striking out application in both enclosures is premised on the legal issue that a defence of fair comment must be grounded on comments and not statement of facts. Comments must inevitably be based on certain facts. It was further submitted by learned plaintiffs' counsel that the statements made by the first defendant are not comments in nature, but instead, they are pure allegation of facts. Learned counsel cited the following paragraph as an example to contend that the statements made by the first defendant in the recording, are not grounded on any fact to constitute comments. It was further submitted that the statements as produced below are clearly statements of facts and do not contain any comment or opinion by the maker, the first defendant:

> tahu tak banyak mana satu ribu juta boleh beli dua puluh cincin mahal Rosmah. Satu cincin dia dua puluh Juta lebih. Satu ribu juta saya kata pulangkan balik kepada rakyat. Sebab itu duit rakyat, bukan duit bapak kamu punya.
>
> ... masalahnya kalau duit minyak tu sampai dalam poket dia dulu, kalau sampai seratus pakcik, yang sampai kepada rakyat lima ringgit. Sembilan puluh lima ringgit masuk kocek dia dengan masuk beg tangan Rosmah.

[10] It is a settled law that the defence of fair comment is applicable only when the statements made are comments based on certain facts. A statement purportedly based on "facts" alone, or even if it is a case where there is a mixed of facts and comments, until a reader cannot distinguish which are the facts, and which are comments, cannot be shielded under a defence of fair comment.

[11] The scope of the defence of fair comment is well illustrated by the following observation of Fletcher Moulton LJ in *Hunt v. Star Newspaper Co Ltd* [1908] 2 KB 309 where it was held that:

> In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment

[12] The Court of Appeal in *Chong Swee Huat & Anor v. Lim Shian Ghee t/a L & G Consultants & Education Services* [2009] 4 CLJ 113 held that, fair comment does not cover assertion of facts but only comments or opinion. In order to succeed on a defence of fair comment, the words complained of must constitute a comment or an expression of opinion. It was found in that case that, the words complained of were clearly an assertion of facts for which the defence of justification would be more appropriate.

[13] The High Court case of *Datuk Seri Mohammad Nizar Jamaluddin lwn. Utusan Melayu (M) Bhd* [2014[2 CLJ 605 held that the statement:

> Kelmarin, Mohammad Nizar menerusi akaun Twitter miliknya mengeluarkan komen Sultan Johor menyalahguna wang rakyat dalam pembelian nombor plat WWW 1 yang dibida pada harga RM520,000

is not a comment but a statement of fact. In *Lee Kuan Yew v. Derek Gwyn Davies & Ors* [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691; [1990] 1 MLJ 390, it was held that in deciding whether the words are facts or comments the applicable test "is whether an ordinary reasonable reader on reading the whole article would understand the words as a comment or a statement of fact." The court, in that case, had further observed that if the facts and comments were so mixed up that one cannot be distinguished from the other, then the defence of fair comment would not be available to the defendant.

[14] In another Singapore case of *Meeran Lebbaik Maullim v. J Mohamed Ismail Marican & The Straits Printing Works* (1926) 2 MC 85, (at p. 96, para. 2) in determining whether the impugned document was a comment, the court held that:

> Now in my opinion there is very little in this document which can claim to be comment at all. If it is examined it will be seen that hardly anywhere is there an expression of the writer's opinion, on the contrary, there are a number of allegations of fact which of course cannot be comment. Had the writers after setting forth the true facts drawn from the deduction that the plaintiffs were Quadianis or Kafirs such an opinion in view of the facts that have been established in this case *viz* that the plaintiffs belonged to an association the Anjuman-i-Islam which was a branch of the Woking Mission founded by Khwaja Kamal-ud-din an Ahmadiya, would I think have been comment which provided it was honest and without malice would have been entitled to immunity. In this document however the writers are most careful to express no opinion of their own.

[15] Guided by the decided authorities above, we found it clear that in determining whether or not a particular statement before the court is a comment or otherwise, the court will have to examine the statement, applying the test of a reasonable person. And it is to be determined on whether or not that statement is an opinion, or a comment which is based on certain facts. There are plethora of authorities which propounded this axiomatic legal principle (see for instance *S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor* [2011] 1 CLJ 460; [2011] 1 MLJ 460, *Kemsly v. Foot* [1952] 1 All ER 501, *Broadway Approvals v. Odhams Press* [1965] 2 All ER 523).

[16] We have scrutinised the Privy Council decision from Singapore in *Joshua Benjamin Jeyaretnam v. Goh Chok Tong* [1989] 1 LNS 34; [1989] 3 MLJ 1 cited to us by learned counsel for the defendants. Learned counsel contended that it would be difficult to differentiate between comments and assertion of facts, hence it would be crucial to identify whether the words complained of are purely assertion of facts, because anything which are not facts are comments. Thus, it would be important and necessary to hear evidence, before such a determination is made. Learned counsel also reminded us that since the plaintiffs are public figures, they are inevitably opened to comments.

[17] Upon our assessment of the decision by the Privy Council in *Joshua Benjamin Jeyaratnam v. Goh Chok Tong (supra)*, in our view the decision does not detract from the basic law on fair comment. In fact, the decision is quite consonant with the trite position that such a defence applies firstly to a statement which is a comment and not a statement of fact. Lord Ackner when delivering the decision of the Privy Council in that case had examined the four elements below, which constitute a defence of fair comment:

(i) the word complained of are comments, although they may consist or include inferences of facts;

(ii) the comment is a matter of public interest;

(iii) the comment is based on facts; and

(iv) the comment is one which a fair-minded person can honestly make on the facts proved.

Because item (ii) above was not contested in that case, Lord Ackner proceeded to deliberate on the other three elements. Of relevance to the point of contention before us, is the first item, that is whether the statement in the recording is a comment or an opinion or a mere allegation of facts as contended by the plaintiffs. In deliberating on the issue of what amounts to a comment, His Lordship referred to the following paragraph in the 8th edn of *Gatley on Libel and Slander* which states:

> Comment is a statement of opinion on facts. It is comment to say that a certain act which a man has done is disgraceful or dishonourable; it is an allegation of fact to say he did the act so criticised ..., while a comment is usually a statement of opinion as to merits or demerits of conduct, an inference of fact may also be a comment. There are, in the cases, no clear definitions of what is comment. If a statement appears to be one of opinion or conclusion, it is capable of being comment.

[18] The difference between what is a comment and what is a statement of fact was demonstrated clearly in that case in relation to the impugned statement therein. It was in relation to a statement made by the respondent against the appellant who spoke at an inaugural meeting of the Singapore Democratic Party. At press conference, after stating that the appellant had spoken at the inaugural meeting, the respondent remarked that the appellant 'left the hall, and when he left the hall 200 participants left with him'. This part of the statement was found to be clear statement of fact by the court. The following part of the statement made by the respondent, however, was found to be a comment:

> I believe the exodus was engineered. I don't think it was a spontaneous exodus. If it was, it did not speak well for the SDP. It shows that the crowd, the limited crowd still looks toward Mr Jeyaretnam, for the time being as a leader of the opposition. But I am inclined to believe that the exodus was contrived by the leader of the Worker's Party to show who is boss at this state. And surely Mr Chiam cannot take that trick lightly.

In their Lordship's judgment, it would be opened to the judge to take a view that an observation made following a statement of facts is either an expression of opinion or a conclusion or inference drawn from those facts, and therefore capable of being a comment. From this observation, we can easily deduce that the court is fully entitled to decide that a particular statement is a comment and not a bare or naked statement of facts when it contains a person's belief for his conclusion which is based on, or drawn from certain facts. Having given our consideration to it, we found the case of *Joshua Benjamin Jeyaratnam v. Goh Chok Tong* is clearly in support of the

A plaintiffs' proposition that the court has to firstly, determine whether a statement is a comment or not, before determining whether a defence of fair comment becomes an available defence to a defendant.

[19] The striking out of a defence of fair comment is not new, as it was allowed by the Federal Court in *Henry Wong Jan Fook v. John Lee & Anor* B [1975] 1 LNS 57, on the ground that it was not pleaded as a defence of fair comment on a matter of public interest. It is therefore not always necessary, in our view for the court to decide whether a particular statement is a comment or otherwise by adducing evidence from witnesses. By just looking at the pleadings and the pleaded impugned statement in this case, it becomes C plain and clear that the statement made by the first defendant is not an opinion or what the first defendant believe, or his comment on any particular fact.

[20] Learned counsel for the defendants further contended that the impugned speech must be taken in the context it was made. According to D learned counsel, when those statements were spoken, they were intended to be humorous, rhetorical or hyperbolic which allow the court to characterise them as comments and not facts. Learned counsel referred us to the 6th edn of *Carter-Ruck on Libel and Privacy* on the part which discusses the application of a defence of fair comment to a matter of public interest. We have no doubt E the defence applies only to matters of public interest. We are not determining whether or not the statement in the recording is a matter of public interest, here. As propounded in *Joshua Benjamin Jeyaratnam v. Goh Chok Tong*, the first thing to look at in the application of the defence of fair comment is that the words spoken of must first of all constitute a comment. It is incumbent F upon the defendants firstly to establish that the impugned statement is a comment, an opinion or what the defendants believe, to qualify for the statement to be characterised as a comment. Thus, even before considering the other elements, which constitute fair comment as elucidated by Lord Ackner, it is vital that the first element be first established. Besides, it is G opened to the defendants at trial to prove to the court that the statement was made in jest and cannot be defamatory of the plaintiffs. That is quite another issue altogether, of which we are not called upon to determine in this appeal.

[21] Of course when a comment is based upon facts, it cannot be on the facts invented by the maker himself. It must rest upon facts which are H presumed to be true. If the fact never exists, then the defence must fail. In line with this requirement, O. 78 r. 3(2) of the Rules of Court provides for the procedural requisite for particularisation of the facts relied upon in support of any comment or opinion. The defendants here are duty-bound to particularise what are the facts relied upon in order to support that the I allegations made are their true beliefs or opinions, and not to leave to the plaintiffs and finally the court to speculate, pick and choose for them.

[22] It was also an argument of learned counsel for the defendants that the speech on 22 November 2014 was made at the time when the Government's excessive spending and wastage and the plaintiffs' luxurious lifestyle had become known to the Malaysian public. If that is the intention of the defendants, the defendants could have pleaded that the statement made was based on such facts before a defence of fair comment could be invoked and relied upon. What is obvious to us is that, the pleaded defence of the defendants did not set out the facts relied upon and which form the basis of the purported comment as submitted.

[23] Our examination of the impugned statement in the present case shows clearly and plainly that it is not a comment but a mere allegation or statement of facts saying that the plaintiffs have stolen and pocketed people's monies from the removal of oil subsidies for their personal gains. If we were to look at the speech as a whole and the first defendant's defence in paras. 24, 25, 26 and 26A, none of the facts pleaded therein support the allegation that the plaintiffs have stolen and pocketed people's monies from the removal of the oil subsidies for their personal gains to enable a characterisation that the statement is a comment or an opinion premised upon some facts. Without the underlying facts which could form the basis of a comment, the impugned statement cannot be said to be a comment that can qualify for a defence of fair comment.

[24] In our view, the learned High Court Judge had erred in law in deciding that this is not a plain and obvious case for striking out pursuant to O. 18 r. 19 of the Rules of Court 2012. On the facts of the present appeal and guided by the test propounded by the various authorities, we do not find any necessity for further enquiries to decide whether or not the spoken words in this case are comments or otherwise.

[25] We have reproduced para. 24 of the first defendant's amended statement of defence and counterclaim below, where the first defendant merely pleaded that:

> Further and/or in the alternative if and so far as the Words complained of refer to the 1st and 2nd Plaintiffs, they are fair comment made by the 1st Defendant, as a Member of Parliament, in good faith and without malice upon a matter of public interest, which any fair-minded person could have arrived at. The 1st Defendant was in fact questioning the dubious fiscal and economic decisions of the Federal government, headed by the 1st Plaintiff as Prime Minister of Malaysia

The above pleading as an example, undeniably fails to distinguish and detail out which part of the impugned statement is a fact and which part is an opinion or a comment. The defendant has thereby failed to adhere to the requirements of O. 78 r. 3(2) of the Rules of Court 2012.

A **[26]** For all the reasons above-stated, we allowed both of the appeals by the plaintiffs. We allowed the application of the plaintiffs in encl. 16 to strike out paras. 24, 25, 26 and 26A of the first defendant's amended statement of defence and counterclaim which relate to the defence of fair comment. The decision of which would also apply to encl. 21 where paras. 25, 26 and 27
B of the defence and counterclaim of the second defendant would stand struck out.

The appeals of both plaintiffs were allowed with costs in the cause.

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